80-1606

No.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRICE ENTERPRISES, INC., ET AL.,
Petitioners,

v.

AMERICAN INTERNATIONAL PICTURES, INC., ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

Whether the "business records" exception of Rule 803 (6), Fed. R. Evid., authorizes the admission of documents prepared in anticipation of litigation without allowing for cross-examination.

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IN THE

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No.

PRICE ENTERPRISES, INC., ET AL.,
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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Price Enterprises, Inc., Azalea Drive-In Theaters, Inc., Chesapeake Drive-In Theatres, Inc., Shore Drive Treaters, Inc., Penninsula Twin Drive-In Theater, Inc., Twin Drive-In Theater, Inc., and Drive-In Theaters, Inc. petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.[1]

OPINION BELOW

The opinion of the Court of Appeals is not reported. The opinion is reprinted as Appendix A, *infra*, to this petition.

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[1] Respondents are American International Pictures, Inc., AVCO Embassy Pictures, Inc., Buena Vista Distribution Co., Inc., Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Distributing Corporation.

JURISDICTION

The judgment of the Court of Appeals was entered on December 22, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

RULE INVOLVED

Rule 803(6) of the Federal Rules of Evidence provides that the hearsay rule, Rule 802, does not apply to:

> A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of circumstances of preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

STATEMENT

Petitioners are seven corporations operating drive-in movie theaters in the Tidewater area of Virginia. Respondents are the major distributors of motion pictures in the United States. On December 14, 1978, respondents filed a diversity suit against petitioners and one additional defendant, alleging that petitioners had underreported the box office revenues generated by the exhibition of respondents' films. After a trial to a jury, the court entered judgments in favor of respondents, ordering petitioners to pay both compensatory and punitive damages. The Court of Appeals affirmed.

A central issue at trial related to the admission of certain documentary evidence compiled by respondents. Movie exhibition contracts provide for payment to distributors on the basis of a percentage share of box office revenues generated by the distributors' films. Total box office revenues are reported by the exhibitor to the distributor on a regular basis. To police the accuracy of such reports, and to gather evidence for cases of alleged underreporting or other breaches of the exhibition contract, distributors retain the services of verification companies to conduct periodic checks of the exhibitors' ticket sales.[2] In the present case, respondents sought to prove liability and damages largely through introduction of reports prepared by individual "checkers," but without allowing defendants an opportunity for cross-examination.

This evidence was at the core of respondents' case. On the issue of underreporting, respondents used the checking reports and derivative evidence in an effort to show that box office revenues, as reported by the exhibitors to the distributors, were higher when the theaters were subject to open checks than during blind checks. On the issue of respondents' damages, respondents de-

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[2] These checks are of two types. In a so-called "open check," the verification company sends an individual "checker" to the theater that is being monitored, and the checker identifies himself to the theater manager and explains the purpose of his visit. The checker then counts the number of paying customers entering the theater and prepares a report containing this and other information for the distributor. In the second type of check—the so-called "blind check"—the individual does not identify himself as a theater checker. He is instructed, instead, to enter the theater undercover as a paying customer, and to attempt to measure the volume of the exhibitors' business. In the case of a drive-in theater, the checker counts the number of vehicles—but not the number of individual patrons—entering the theater during the course of the evening. Reports of such blind checks are prepared by the checker for the verification company and sent to the distributor for comparison with open check reports.

pended heavily on the car-counts in the checking reports as proof of the degree of alleged underreporting by petitioners' theaters. Consequently, respondents' case relied directly on hundreds of investigative checking reports prepared by individuals who were not called to testify, and whose objectivity and trustworthiness were never tested on cross-examination.

Relying on this Court's decision in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), petitioners objected to admission of the reports on the ground that they were not neutral business records, but evidence deliberately compiled with an eye to eventual litigation. As such, petitioners contended, the records were inadmissible hearsay under Rule 802 of the Federal Rules of Evidence, not exempt records under the provisions of Rule 803. Petitioners also demonstrated inadequacies in the reports, showing that during "blind checks" the checkers failed to exclude from their car-counts vehicles entering the theaters on free passes, or to make deliveries to theater concession stands, or for other purposes that might account for discrepancies between blind and open checking results. In addition, petitioners pointed out that the theaters' reported revenues in many instances actually exceeded the revenue totals indicated by the blind check reports, thus calling into question the accuracy of the car-counts made by the checkers.

Despite the questionable circumstances surrounding the reports, the District Court held that they qualified as business records under Rule 803(6).[3] The District Court ruled that the reports and derivative evidence were admissible, subject to certain protective conditions, with-

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[3] The District Court relied on *L.C.L. Theatres Inc.* v. *Columbia Pictures Industries, Inc.*, 241 F. Supp. 1090 (N.D. Tex. 1976), *aff'd in part, rev'd in part*, 566 F.2d 494 (5th Cir. 1978), a decision involving similar facts, but which addressed only obliquely the issue of admissibility under Rule 803(6).

out the need to produce the checkers for cross-examination (Pet. App. B, *infra*). Thus, respondents were permitted to put before the jury the reports themselves, exhibits summarizing the reports, and the expert testimony of a statistician whose opinions were based on the reports, all without the discomfort of calling the individual checkers who prepared the reports, and on whose reliability the contents of the reports depended.

The Court of Appeals affirmed in a brief opinion. Without directly addressing the claim that reports prepared in anticipation of litigation are inadmissible under Rule 803(6), and without discussing *Palmer v. Hoffman*, *supra*, the Court merely stated: "In our opinion, the defendants' objections to this evidence were directed to its weight, not its admissibility. . ." Pet. App. at 5a, *infra*.

REASONS FOR GRANTING THE PETITION

This petition presents a narrow but important federal question: whether the "business records" exception of Rule 803(6), Fed. R. Evid., authorizes the admission of documents prepared in anticipation of litigation without allowing for cross-examination. Construing the predecessor to Rule 803(6), this Court answered this question in the negative in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943). The Court there stated that admission of such documents "[would] open wide the door to avoidance of cross-examination." *Id.* at 114. The concern expressed in *Palmer* is no less real today.

The issue is one of considerable importance. As a practical matter, the opportunity to challenge the accuracy or veracity of self-serving business reports may determine the outcome of a case. Yet, as the decision below illustrates, the federal courts have frequently dis-

regarded the distinction between genuinely neutral business records and more purposeful records intended for advantage in litigation. In our view, this necessary distinction should be preserved.

1. This case involves the proper construction of Rule 803(6) of the Federal Rules of Evidence, one of the exceptions to the hearsay rule (Rule 802). Rule 803(6) allows the introduction of documents, which would otherwise be hearsay when offered for their substantive truth, "if kept in the course of a regularly conducted business activity, and if it was a regular practice for that business activity to make the [documents] . . . unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness." While the rule is plainly intended to permit freer use of routine business records, in circumstances where no unfairness would result, the rule should not be read to reward businesses that prepare self-serving evidence for litigation as a matter of business routine. When documents are prepared in anticipation of litigation, they necessarily lack the assurance of reliability on which Rule 803(6) depends.

This issue is not one of first impression. Over thirty years ago this Court, interpreting the predecessor statute to Rule 803(6), held that the business records exception did not allow a defendant railroad to introduce the written statement of an employee in litigation concerning a railroad grade-crossing accident.[4] *Palmer* v. *Hoffman*, *supra*. Finding that the report was not the sort of business record contemplated by the statute, the Court noted: "[T]he fact that a company makes a business out of recording its employees' versions of their accidents does not put these statements into the class of records made 'in the regular course of business'. . ." 318 U.S. at

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[4] The employee was a witness to the accident who died prior to trial. His statement had been given several days after the accident to an official of the railroad and a representative of a state utilities commission. 318 U.S. at 111.

113. If the rule were otherwise, the Court observed, it would lead to "a real perversion of a rule designed to facilitate admission of records which experience has shown to be quite trustworthy. Any business by installing a regular system for recording and preserving its version of accidents for which it was potentially liable could qualify those reports under the Act." *Id.*

The Court in *Palmer* carefully distinguished the report at issue from ordinary business records, noting that the former "was calculated for use essentially in the court, not in the business." 318 U.S. at 114. The routine admission of such reports, the Court concluded, "[would] open wide the door to avoidance of cross-examination . . ." *Id.*

Although the statute interpreted in *Palmer* was changed slightly in the adoption of the Federal Rules, the changes were not intended to do away with the distinction between documents for business and documents for litigation. The business records rule, now as then, is designed to facilitate the admission of ordinary business records that are presumed reliable because of the regularity of their preparation and the neutral purposes for which they were made. "The element of unusual reliability of business records is said variously to be supplied by systematic checking, by regularity and continuity which produce habits of precision, by actual experience of business in relying upon them, or by a duty to make an accurate record as part of a continuing job or occupation." Notes of Advisory Committee on the Federal Rules of Evidence, 28 U.S.C.A. at 587. As the Court recognized in *Palmer*, however, it perverts the rule to allow evasion of the right to cross-examination where the asserted business records were prepared to serve a vested interest in litigation. In such cases, the elements of unusual reliability are strikingly absent.

The right of cross-examintion is, of course, an essential procedural safeguard in both civil and criminal proceedings. "[C]ertainly no one experienced in the trial of lawsuits . . . would deny the value of cross-examination in exposing falsehood and bringing out the truth. . . ." *Pointer* v. *Texas*, 380 U.S. 403, 404 (1965). The right of cross-examination has been described as "one of the safeguards essential to a fair trial," *Alford* v. *United States*, 282 U.S. 687, 692 (1931), which "[t]his Court has been zealous to protect . . . from erosion." *Greene* v. *McElroy*, 360 U.S. 474, 497 (1959). Denial of the right violates the Sixth Amendment's Confrontation Clause in criminal trials, *Pointer* v. *Texas*, *supra*, as well as the Due Process Clause of The Fifth and Fourteenth Amendments, *In Re Oliver*, 333 U.S. 257, 273-274 (1948). As this Court stated in *Pointer* v. *Texas*, *supra*:

> "There are few subjects, perhaps, upon which this this Court and other courts have been more nearly unanimous than in their expressions of belief that the right of confrontation and cross-examination is an essential and fundamental requirement for the kind of fair trial which is this country's constitutional goal." 380 U.S. at 405.

The chief purpose of the hearsay rule is the protection of the right to cross-examination. *Anderson* v. *United States*, 417 U.S. 211, 220 (1974); 5 J. Wigmore, Evidence § 1362; C. McCormick, Law of Evidence § 245. Because of the importance of that right, exceptions to the hearsay rule—including the exception for business records—must be narrowly construed. Documents aimed at litigation simply lack the indicia of trustworthiness and reliability needed to justify exemption from the hearsay rule and denial of the right of cross-examination.

The decision of the Court of Appeals below disregards these principles.[5] The checking reports in this case, like the report at issue in *Palmer*, were clearly documents prepared in contemplation of litigation. The vast majority of the blind checks of petitioners' theaters were conducted at the direction of respondents' New York law firm, Sargoy, Stein & Hanft (Pet. App. at 8a, *infra*). Moreover, the very purpose of theater checking is to build a record for possible damage claims against exhibitors. If all exhibitors' reports of box office revenues were accurate, the costly process of checking the exhibitors' business would be needless and redundant. Obviously, the checks have as their ultimate purpose the generation of more money for the distributors, at the expense of the exhibitors. Under these circumstances the potential for bias is apparent—a potential that is in no way lessened by the fact that the checkers are in the "business" of preparing checking reports. See *Palmer* v. *Hoffman*, 318 U.S. at 113-14. Businesses should not receive a litigation windfall simply because they have systematized, or made a business routine out of, the preparation of advantageous documents.

2. The issue raised by this petition has repercussions beyond the instant case. In approving the admission of checking reports and derivative evidence, the Court of Appeals below reasoned that petitioners' objections went only to the weight of the evidence, not to its admissibility. That rationale, however, would permit the admission of virtually any hearsay testimony or other evidence excluded by the Federal Rules. The probative value of evidence is always a matter for the trier of fact. The question presented under Rule 803(6) is whether cross-examination is necessary to enable the jury to properly assess the weight to be given the contested evidence.

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[5] Although petitioners relied upon *Palmer* below, the Court of Appeals' opinion does not even mention, much less attempt to distinguish, that decision.

The federal courts have struggled with this issue without conspicuous success. Many courts have been reluctant to limit the opportunity for cross-examination in the face of documentary evidence that has been prepared with a view to possible litigation. See, *e.g.*, *United States* v. *Burrell*, 505 F.2d 904, 908 (5th Cir. 1974); *Bracey* v. *Herringa*, 466 F.2d 702 (7th Cir. 1972); *United States* v. *Ware*, 247 F.2d 698, 700 (7th Cir. 1957); *Gilmore* v. *Strescon Industries, Inc.*, 66 F.R.D. 146 (E.D. Pa.), *aff'd mem.*, 521 F.2d 1398 (3d Cir. 1975). See also *United States* v. *Smith*, 521 F.2d 957 (D.C. Cir. 1975) (police investigative reports inadmissible if offered by the prosecution, but admissible if offered by the defendant). Other courts, however, have freely permitted the admission of self-serving business documents prepared, at least in part, for use in litigation. See, *e.g.*, *Lewis* v. *Baker*, 526 F. 2d 470 (2d Cir. 1975); *United States* v. *Baxter*, 492 F. 2d 150, 165 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974); *Taylor* v. *Baltimore & Ohio Railroad*, 344 F. 2d 281 (2d Cir.), *cert. denied*, 382 U.S. 831 (1965); *Terrasi* v. *South Atlantic Lines*, 226 F. 2d 823 (2d Cir. 1955), *cert. denied*, 350 U.S. 988 (1956). These latter cases have caused confusion among the courts and, presumably, have also left businesses and other prospective litigants uncertain about the scope of the business records rule, and the admissibility of documents that they prepare and maintain.

CONCLUSION

For the foregoing reasons, the instant petition should be granted.

Respectfully submitted,

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Appendices

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1751

AMERICAN INTERNATIONAL PICTURES, INC.; AVCO EMBASSY PICTURES, INC.; BUENA VISTA DISTRIBUTION CO., INC.; COLUMBIA PICTURES INDUSTRIES, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; UNITED ARTISTS CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; WARNER BROS. DISTRIBUTING CORPORATION,

Appellees,

versus

PRICE ENTERPRISES, INC.; AZALEA DRIVE-IN THEATERS, INC.; CHESAPEAKE DRIVE-IN THEATERS, INC.; SHORE DRIVE THEATERS, INC.; PENINSULA TWIN DRIVE-IN THEATER, INC.; TWIN DRIVE-IN THEATER, INC.; DRIVE-IN THEATERS, INC.,

Appellants.

Appeal from the United States District Court
for the Eastern District of Virginia, at Norfolk.
J. Calvitt Clarke, Jr., District Judge

Argued November 12, 1980 Decided December 22, 1980

Before BUTZNER, Circuit Judge; FIELD, Senior Circuit Judge, and HALL, Circuit Judge.

Stanley E. Sacks (Girard C. Larkin, Jr., Sacks, Sacks, Perkins & Larkin on brief) for Appellants; Lewis T. Booker (L. Neal Ellis, Jr., Hunton & Williams on brief) for Appellees.

FIELD, Senior Circuit Judge:

Price Entreprises, Inc., and six other motion picture exhibitor corporations[1] appeal from judgments entered against them in the district court in favor of nine motion picture distributor corporations.[2] The judgments, based upon jury verdicts, aggregated $288,931 and included in that amount was $170,001 in punitive damages awarded against Price Enterprises, Inc.

The action was filed by the distributors, alleging that the defendant corporations, all under the control of Earnest H. Price, had engaged in a scheme or plan to defraud the distributors by submitting false and inaccurate statements with respect to gross admission receipts and the number of patrons admitted to theaters. The complaint further alleged that the defendants had failed to pay the distributors the full percentage rentals due on motion pictures licensed to them as required by the license agreements. In their answer, the defendants denied the allegations of the complaint and also asserted an antitrust

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[1] Azalea Drive-In Theaters, Inc.; Chesapeake Drive-In Theaters, Inc.; Shore Drive Theaters, Inc.; Peninsula Twin Drive-In Theater, Inc.; Twin Drive-In Theater, Inc.; Drive-In Theaters, Inc.

[2] American International Pictures, Inc.; Avco Embassy Pictures, Inc.; Buena Vista Distribution Co., Inc.; Columbia Pictures Industries, Inc.; Paramount Pictures Corporation; Twentieth Century-Fox Film Corporation; United Artists Corporation; Universal Film Exchanges, Inc.; Warner Bros. Distributing Corp.

counterclaim. Upon motion of the plaintiffs the district court severed the counterclaim for separate trial, and subsequently the defendants took a voluntary dismissal of their counterclaim.

The licensing agreements involved in this litigation were based upon well established procedures of the film distribution industry. Under these procedures the film rentals consist of a percentage of the gross revenue derived from the exhibition of a film over a designated period and, accordingly, the distributor's revenue is dependent upon the accurate reporting of gross admissions by the exhibitor. Under the usual formula the distributor calculates the film rental by applying an agreed percentage to the gross admissions as reported by the exhibitor. Incident to such an arrangement, the license agreements require that each patron receive a sequentially numbered ticket and that the cashiers record the ticket numbers issued on daily box office reports. Based upon this information the number of gross admissions is reported by the exhibitor on standard forms issued by the distributor for that purpose.

To ensure that receipts are reported accurately, the license agreements give the distributors the right to audit the exhibitor's books and records, including the daily box office reports and bank statements. In addition, the distributors have developed other procedures to test the accuracy of an exhibitor's reports, including the conduct of "open" and "blind" checks. An "open" check is conducted by an inspector who identifies himself to the theater manager and advises him that he is there to check the evening's receipts. Under a "blind" check, a distributor sends an inspector to count the attendance of a theater without the knowledge of the theater management, and the distributor then compares the checker's account against the box office receipts reported by the exhibitor for that date. In the present case the dis-

tributors conducted both "open" and "blind" checks of the entire chain of Price theaters, as well as audits of the exhibitor's books and records.

There is ample evidence in the record to support the jury's finding that the defendants were guilty of fraudulent conduct in consistently understating their gross receipts for the period from July 1, 1975, to June 30, 1979. Over four hundred "blind" checks were conducted during that period, and the gross admissions reported on the days of such checks were invariably substantially less than the gross receipts reported on "open" checking days. The evidence also showed that receipts from "late sales" were unreported and were not included in the cash receipts from other ticket sales deposited by the theater managers in their bank accounts. According to the evidence, the defendants also resorted to the sale of unreported strip tickets as well as the use of duplicate tickets to conceal their actual ticket sales. Audits of the defendants' records disclosed a variety of unexplained discrepancies, including deposits of substantial sums in undisclosed bank accounts of the defendants. This evidence was augmented by testimony of a number of former employees of the defendants, all of which demonstrated that the defendant theaters engaged in a deliberate course of conduct designed to defraud the distributors.

The defendants have raised a number of questions upon appeal, but only three of them merit any discussion. First, defendants challenge the action of the district court in admitting into evidence the reports of the "open" and "blind" checks prepared by the companies who conducted them. The court ruled that these reports were admissible under Rule 803(6), Federal Rules of Evidence, and we see no error in its action. The distributors were prepared to call as witnesses all of the 113 checkers responsible for the reports, and in advance of trial had identified each of them for the defendants. The district court permitted

the introduction of the records subject to certain protective provisions, and in accordance therewith the officers of the checking companies authenticated the reports and detailed their procedures for the selection, training and supervision of the checking personnel. In our opinion, the defendants' objections to this evidence were directed to its weight, not its admissibility, and the district judge carefully charged the jury with respect to the weight and significance to be accorded the reports. We note that the admission of such evidence in a strikingly similar case was approved on appeal. *L.C.L. Theatres* v. *Columbia Pictures Industries*, 421 F.Supp. 1090 (N.D. Tex. 1976), *aff'd in pertinent part*, 556 F.2d 494 (5th Cir. 1978).

The defendants also contend that it was error to permit Dr. Robert Peterson, an expert statistician, to testify relative to the damages sustained by the plaintiffs as a result of the defendants' inaccurate reporting. Dr. Peterson reached his conclusions by applying accepted statistical techniques to the evidence in the case, and while the defendants' statistician disagreed with Peterson's evaluations, such criticism was directed only to its weight and did not affect its admissibility. The court permitted the defendants to conduct an exhaustive cross-examination of Dr. Peterson and properly instructed the jury on the manner in which they should consider his testimony.

The defendants argue that the award of damages was based upon the "fluid recovery" theory, and suggest that such a basis was improper under our decision in *Windham* v. *American Brands, Inc.*, 565 F.2d 59 (1977). *Windham*, however, has no application to this case. The "fluid recovery" theory which would distribute damages to unspecified parties rather than to specific class members who were actually injured was rejected by us in that case as an improper solution to "the manageability problems of class actions". *Id.*, at 72. This, of course, is not

a class action and, in any event, there was no "fluidity" in the distribution of damages. The proof established that each of the distributors was injured by the misconduct of the defendants, and the discrete damages awarded to the plaintiffs were based upon apportionment of the gross damages as calculated from the evidence.

We have carefully considered the other assignments of error and find them to be without merit. Accordingly, the judgments are affirmed.[3]

AFFIRMED.

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[3] During oral argument the question was raised from the bench as to whether an award of punitive damages against Price Enterprises, Inc., was appropriate under Virginia law since no compensatory damages had been assessed against that defendant. Since the issue was not raised in either the trial court or upon this appeal, we decline to consider the point. We note, however, that Price Enterprises, Inc., was a party to at least some of the licensing agreements and controlled all of the defendant corporations, and it occurs to us that these circumstances would have justified the entry of joint judgments for compensatory damages against Price Enterprises, Inc., and each of the exhibitor defendants.

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
NORFOLK DIVISION

Civil Action No. 78-651-N

AMERICAN INTERNATIONAL PICTURES, INC., *et al.*,
Plaintiffs,

v.

PRICE ENTERPRISES, INC., *et al.*,
Defendants,

OPINION AND ORDER

The Court has for determination the admissibility of certain business records based upon blind and open checks of customer attendance at the defendants' theaters. The plaintiffs caused to be conducted checks on the attendance at defendants' theaters for the purpose of determining whether defendants were truthfully reporting those attendance figures. Most film rental agreements between distributors and exhibitors provide that film rental paid to the distributor is based upon a percentage of ticket sales. Therefore, the distributors have a vital interest in the accuracy of the reports of gross ticket sales made by the exhibitors.

It is agreed that open checks are made when a checker for a distributor identifies himself to the manager of a theater and advises the manager that he is there to count the number of patrons in the theater and to check the theater's records. It is further agreed that a blind check is conducted by a checker counting the number of patrons entering a theater without the knowledge of the theater's employees.

In the case at bar, the distributors have caused to be conducted both open and blind checks on the Price theaters. Approximately 113 checkers were employed. The Court must rule on the question of whether, as contended by the defendants, the plaintiffs must present all 113 checkers to testify concerning their individual part in the overall survey. Plaintiffs contend that the results of the check are admissible pursuant to Rule 803 (6), Federal Rules of Evidence, as business records. The plaintiffs propose to present the results of the check by authenticating the records through the custodian or other qualified witness.

Defendant, on the other hand, takes the position that the records were not prepared in the normal course of business so as to qualify under Rule 803(6), but were prepared instead for the purpose of litigation. Defendant further states that the Court should refuse to allow the presentation in the manner requested by the plaintiff on the ground that the evidence is inherently untrustworthy. The plaintiffs rely principally on *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090 (N.D. Tex. 1976), and the defendant relies principally on *Palmer* v. *Hoffman*, 318 U.S. 109 (1943).

While defendant seeks to distinguish between the system of hiring and supervising the checks in the case at bar and in the *L.C.L. Theatres* case, the Court finds no such difference. In both cases, according to the defendant's own brief and the District Court opinion, the checkers were arranged for by the firm of Sargoy, Stein and Hanft.

The Court is of the opinion that the *L.C.L. Theatres* case is precisely in point and is a well reasoned and logical opinion. This Court, for the reasons stated by Judge Higginbotham in the *L.C.L. Theatres* case, will permit the introduction of the records subject to certain protective provisions as follows:

(1) The plaintiffs will be required to authenticate the checking records by a competent witness.

(2) The plaintiffs will be required to explain who seselected the checkers, who supervised the checkers, who trained the checkers, and what training the checkers received by competent evidence.

(3) The plaintiffs will be required to present the evidence of two blind and two open checkers to testify what instructions and supervision they received and to describe how they carried out their duties and made their reports.

(4) If the plaintiffs have not already done so, they must forthwith furnish the defendant with the names and addresses of all of the checkers who participated in the survey and plaintiffs shall not in any manner interfere with any interviews which the defendant may wish to attempt with any of the checkers.

(5) The defendant shall be permitted to present evidence of any of the checkers that it desires to impeach the reliability of the survey.

The Court feels that this Opinion and Order would not be complete without a comment on the defendants' reliance on *Palmer* v. *Hoffman*, 318 U.S. 109. In that case, a railroad engineer shortly after a crossing accident made a statement about the facts of the accident when interviewed by the assistant superintendent of the railroad. Before the trial, the engineer died and the railroad sought to introduce the statement under the records kept in the ordinary course of business rule. In that case, the Supreme Court properly affirmed the denial of the admissibility of the statement. The engineer's statement did not represent the results of a survey occasioned by a continuous business relationship between the plaintiffs and the defendants. Rather, it was a unique statement

given concerning a unique occurrence. Furthermore, the statement was made in the presence of and presumably under the domination of a high official of the railroad. There is no allegation in the case at bar that the checkers made their observations and wrote their reports in the actual presence of a high official of any distributor or the distributor's law firm.

It is so ORDERED.

/s/ J. Calvitt Clarke, Jr.
United States District Judge

September 20, 1979

Norfolk, Virginia

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 79-1751

AMERICAN INTERNATIONAL PICTURES, INC.; AVCO EMBASSY PICTURES, INC.; BUENA VISTA DISTRIBUTION CO., INC.; COLUMBIA PICTURES INDUSTRIES, INC.; PARAMOUNT PICTURES CORPORATION; TWENTIETH CENTURY-FOX FILM CORPORATION; UNITED ARTISTS CORPORATION; UNIVERSAL FILM EXCHANGES, INC.; WARNER BROS. DISTRIBUTING CORPORATION,

Appellees,

versus

PRICE ENTERPRISES, INC.; AZALEA DRIVE-IN THEATERS, INC.; CHESAPEAKE DRIVE-IN THEATERS, INC.; SHORE DRIVE THEATERS, INC.; PENINSULA TWIN DRIVE-IN THEATER, INC.; TWIN DRIVE-IN THEATER, INC.; DRIVE-IN THEATERS, INC.,

Appellants.

Appeal From United States District Court
for the Eastern District of Virginia

JUDGMENT

THIS CAUSE came on to be heard on the record from the United States District Court for the Eastern District of Virginia and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is, hereby affirmed.

/s/ William K. Slate II
Clerk

December 22, 1980

FILED
APR 27 1981

No. 80-1606

In The

Supreme Court of the United States

October Term, 1980

PRICE ENTERPRISES, INC., et al.,
Petitioners,

v.

AMERICAN INTERNATIONAL PICTURES, INC., et al.,
Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

---

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION FOR REVIEW

The question for review stated by Petitioners is not now and never has been an issue in this case. While the admissibility of evidence pursuant to Rule 803(6), Federal Rules of Evidence, was indeed an issue below, the evidence does not support the statement that the documents admitted were prepared in anticipation of litigation or that they were admitted without provision for cross-examination.

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In The

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No. 80-1606

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---

RESPONDENT'S BRIEF IN OPPOSITION

Respondents American International Pictures, Inc., Avco Embassy Pictures, Inc., Buena Vista Distribution Co., Inc., Columbia Pictures Industries, Inc., Paramount Pictures Corporation, Twentieth Century-Fox Film Corporation, United Artists Corporation, Universal Film Exchanges, Inc., and Warner Bros. Distributing Corporation, collectively referred to as the Distributors, oppose the issuance of a writ of certiorari to the United States Court of Appeals to review its opinion in this case. That opinion is now reported at 636 F.2d 933 (4th Cir. 1980).

I.
STATEMENT OF THE CASE

A. The Checkers And Their Supervisors Testified At Length

We disagree with Petitioners' statement of the case as to the documents admitted by the trial court pursuant to Rule 803(6), Federal Rules of Evidence. We therefore restate the evidence relating to the admissibility of those documents. Record references are to the Appendix in the United States Court of Appeals for the Fourth Circuit.

One reading the Statement of the Case prepared by Petitioners gains the impression that the trial court permitted introduction of reports of theatre owners' box office receipts prepared by independently employed checkers without any testimony by the checkers themselves as to how they made their checks or by the custodians of the reports as to how they were prepared. That is directly contrary to what actually happened.

The checks to verify the theatre owners' report of box office receipts were performed by 113 checkers employed by six different checking firms. At the final pretrial conference the Distributors offered to call all 113 checkers and representatives of all the checking firms to authenticate the documents and to describe how each individual check was made. However, upon the Distributors' argument that the reports were admissible pursuant to Rule 803(6) the trial court ruled that the reports would be admissible if the Distributors followed the very stringent authentication requirements set out in the trial court's order of September 20, 1979, reproduced at pages 7a-10a of the Petition.

Pursuant to that order, the Distributors called six of the checkers to testify about their instructions and how they conducted their checks (Blackwood, App. 375-399; Kettring, App. 399-414; Rogers, App. 414-444; Hamilton, App.

444-470; Deuso, App. 472-478; Kord, App. 634-638). Those six witnesses were examined on direct examination for approximately forty-one pages of trial transcript and on cross-examination for approximately seventy-two pages of transcript.

Five supervisors of the checkers were also called at trial to authenticate the reports and to outline the procedures they followed (Roth, App. 177-236; Rosenblith, App. 237-271; Perakos, App. 272-314; Smith, App. 315-349; Wardlow, App. 350-374). Another supervisor's deposition was taken and read at trial (Bernstein, App. 2070-2095). With the exception of one brief introductory witness the first 521 pages of a trial transcript which ultimately consisted of 2574 pages of testimony contain the direct and cross-examination of the very witnesses whom Petitioners contend they were denied the opportunity to cross-examine at trial.

To put it another way, the presentation of the Distributors' evidence at trial took five courtroom days. Two of those days—nearly 40% of the Distributors' evidence—were devoted to examination and cross-examination of the checkers and their supervisors.

The trial court's order also required the Distributors to produce the names and addresses of all the checkers and directed the Distributors not to interfere with any attempts the Petitioners made to interview the checkers. The order permitted Petitioners to call any checkers they wished to impeach the reliability of their reports. They did not call a single checker witness out of the more than one hundred identified to them.

B. The Checks Were Not Prepared For The Purposes Of Litigation

There is no evidence in the record that those conducting the checks knew that they might be used in litigation. In-

deed, the contrary is true. The checkers were not told the purposes for which the checks were being made (App. 243-244; 288; 359; 422; 2094).

II.
REASONS FOR DENYING THE PETITION

Petitioners attempt to raise a question relating to the weight a jury should give to certain evidence to the level of a denial of the long revered right of cross-examination. Petitioners' attempt fails because it is directly contradicted by the record and because Rule 803(6), Federal Rules of Evidence, merely is an extension of the long-standing and well recognized admissibility of business records into evidence without calling each one of the persons who made the entry to testify about it.

The admissibility of checking reports in motion picture underreporting cases as business records is not a matter of first impression. The leading case addressing the issue is *L.C.L. Theatres, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F.Supp. 1090 (N.D. Tex. 1976), aff'd in part, rev'd in part, 566 F.2d 494 (5th Cir. 1978). In that case 146 blind checks were conducted on eight theatres. Of the 146 blind checks, 79 revealed substantial discrepancies between the checkers' reports and the exhibitor's box office report. The reports were authenticated by supervisors of the checking companies. *L.C.L. Theatres* Trial Transcript 1622-23.

The exhibitor in *L.C.L. Theatres* sought to discredit the trustworthiness of the reports by "pointing to a lack of training of the checkers, the presence of nonpaying employees in the theaters to be counted and the incentive of the checkers to exaggerate their reports in the belief that their employees wanted a large box office" and other alleged biases. 421 F.Supp. at 1094. Those contentions were flatly rejected by the court. Judge Higginbotham observed:

> The fact is that the checkers used were hired not by Sargoy, but by companies such as the Retail Credit Association. Moreover, no credible explanation was offered for the consistent absence in reported box office receipts of differences between the open checkers' reports and the theaters' box office receipts with equally consistent differences between the reports of blind checks and box office reports.

As to the exhibitor expert's testimony that the blind checks contained an unacceptable risk of error, Judge Higginbotham remarked:

> Although there is doubtlessly a margin within which a "checker" will err, common sense tells us that despite all of the "expert" testimony and the claims of Bubis as to the difficulty of a checker's work and the training a checker should have, we are talking about the counting of cars and the counting of people in theaters hardly of the large metropolitan variety.

In a variety of other cases the courts have uniformly held that under Rule 803(6) the authenticator of the record at trial need not have firsthand knowledge of the events recorded. *See, e.g., United States* v. *Reese,* 568 F.2d 1246, 1252 (6th Cir. 1977) (articles prepared and placed in scrapbook by hospital employee admitted through testimony of hospital medical records administrator who had no personal knowledge of the evidence contained in the record); *United States* v. *Pfeiffer,* 539 F.2d 668, 671 (8th Cir. 1976) (observing that "[I]t has long been held that the absence of the person who prepared the exhibit goes to the weight to be given the evidence and not its admissibility," the court held that delivery invoices prepared by other companies were admissible through Goodyear traffic manager).

The weight accorded to such records is within the domain of the trier of fact. *United States* v. *Evans,* 572 F.2d 455, 490 (5th Cir. 1978), *cert. denied,* 439 U.S. 870 (1978) (objections relating to identity or competency of the actual preparer may be relevant to their evidentiary weight but does not effect admissibility). See *Crompton-Richmond Co.* v. *Briggs,* 560 F.2d 1195, 1202 n. 12 (5th Cir. 1977); *Johnson* v. *United States,* 325 F.2d 709, 711 (1st Cir. 1963). The trial court correctly charged the jury as to the weight to be given the records (trial transcript, p. 2547).

By its very terms Rule 803(6) permits the introduction of any business records unless the circumstances of preparation indicate a lack of trustworthiness. Petitioners contend that the records at issue here lack trustworthiness, because they were prepared in anticipation of litigation. Petitioners cite no appendix references to support that assertion. We have set out above the appendix references showing that neither the checkers nor their supervisors knew the purposes for which the records were being made.

As the evidence at trial showed, checks of this kind are constantly being made nationwide. Few of those checks ever get to litigation. As one witness put it, it was simply a survey of motion picture attendance (App. 2094). Thus, any suspicion that the records may not be trustworthy because they may be used in litigation fails because the individuals preparing them, having no knowledge of the proof to which they might be put, have no reason not to be accurate.

Furthermore, the test of admissibility is the function served by the records. The checking supervisors all testified that it was a regular, indeed essential, part of their business to prepare checking reports of the kinds challenged here. In *United States* v. *Baxter,* 492 F.2d 150 (9th Cir. 1973),

cert. den. 416 U.S. 940 (1974), the court admitted records kept by an informant in a criminal matter after he had agreed to cooperate with the United States. The court said, at p. 165:

> "It is true that business records prepared specifically to assist in litigation are unreliable, because they are likely to be self-serving in a way that cannot be scrutinized by cross-examination at trial. However, the test is not the motivation of the employee preparing the record, but the function served by the records in the operation itself. There is no doubt that the Hernandezes continued to depend upon the notebooks, even after the date Wright agreed to cooperate with the Government. The entries made after that date were still prepared in the regular course of business of the Hernandez enterprise."

If such records are admissible in a criminal trial, even though the informant specifically knows they will be used in litigation, then surely records kept in the ordinary course of business by those who have no idea to what use they might be put are admissible in a civil trial.

Although the court below did not specifically mention this Court's opinion in *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), the result it reached is entirely consistent with that opinion. There a statement made by a deceased witness to an extraordinary event, a railroad crossing accident, was denied admissibility on the ground that it did not constitute a business record. As the trial court pointed out in its ruling reproduced at page 9a of the Petition, *Palmer* involved a unique statement concerning a unique occurrence, not records routinely prepared over a course of years. *Palmer* offers no reason to review the opinion of the Fourth Circuit.

III.
CONCLUSION

The evidence in this case shows clearly that the trial court carefully provided for proper authentication of all records introduced at trial and carefully instructed the jury on the weight they could give them. Rule 803(6) requires no more. The Petition should be denied.

Respectfully submitted

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No. 80-1606

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

PRICE ENTERPRISES, INC., ET AL.,
Petitioners,

v.

AMERICAN INTERNATIONAL PICTURES, INC., ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS *

INTRODUCTION

In their opposition, respondents do not dispute that documents prepared for use in litigation are inadmissible as "business records" under Rule 803(6), Fed. R. Evid. Rather, they rely almost entirely on the claim that the checking reports and related evidence in this case were not such documents. To support that view, they stress evidence that individual theater checkers knew nothing about the purpose of their activities (Br. in Opp. at 3-6), and argue that the prohibition against the use of self-serving business documents disappears whenever a business normally prepares the type of documents whose re-

* Petitioners are identified in the Petition at page 1. Petitioners have no additional parent companies, subsidiaries or affiliates.

liability is challenged (Br. in Opp. at 6-7).[1] Neither point has any merit.

I. The Checking Reports Were Prepared in Contemplation of Litigation

Although respondents earnestly contend that the checking reports were not prepared in contemplation of litigation, they are noticeably silent about the mysterious purpose for which they were prepared. In our view, the reports must be deemed litigation documents because their only conceivable purpose is to build a record for possible damage claims against exhibitors.

The costly process of conducting "open" and "blind" checks is not intended to duplicate exhibitors' reports of box office revenues. If exhibitors' reports were invariably accurate, the checking of theaters and the preparation of checking reports would be a pointless and redundant exercise. The activity of theater checking is

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[1] Respondents also suggest that the checking reports did not have to qualify as business records under Rule 803(6) because petitioners were given the opportunity to cross-examine some of the theater checkers. However, the testimony at trial of a handful of checkers—all selected by respondents—is hardly sufficient to overcome the persumption of unreliability that attaches to documents prepared for use in litigation. This is particularly true in view of specific indications that many of the checking reports were, in fact, inaccurate. Pet. at 4. Petitioners do not suggest that it was necessary to call as witnesses all of respondents' checkers. However, given the checkers' potential for bias and the specific doubts concerning the accuracy of the reports, the district court clearly erred in not requiring a more extensive and meaningful opportunity for cross-examination.

Similarly, respondents' position is not helped by the fact that petitioners did not themselves subpoena all or most of respondents' checkers to testify at trial. It was respondents' burden to prove their case by competent evidence, not petitioners' burden to disprove the case with witnesses that respondents declined to call. Moreover, it is frequently the case when hearsay evidence is offered that the out-of-court declarant could be called as a witness by the party against whom the hearsay is offered. Respondents' suggested exception would effectively eliminate the rule.

instead designed to detect instances of underreporting of revenues, and to develop evidence against exhibitors in the event underreporting is found. It is instructive to note that the checks were conducted at the behest, not of respondents' officers or accountants, but of their New York law firm, a circumstance that strongly suggests their ultimate purpose.

Respondents nonetheless emphasize the testimony of some checkers that they did not know the purpose for which their reports were being made (App. 243-244; 288; 359).[2] These individuals may have lacked detailed knowledge of the use to which their records might be put. However, they were certainly aware of the general purpose of their jobs. They were instructed to enter petitioners' theaters undercover as paying customers, and to conceal their activities from the theater managers. The checkers therefore knew that the interests of their clients were adverse to the interests of the exhibitors. Under the circumstances, the purpose of the checking activity could have escaped only the most dim-witted checker.

It is clear, then, that the process of theater checking is designed to collect evidence of underreporting for possible litigation against exhibitors. Respondents have nowhere suggested any other purpose that the checking might serve, and we submit that there is none. Accordingly, the checking reports lacked the indicia of trustworthiness and reliability needed to exempt the checkers from cross-examination under Rule 803(6).[3]

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[2] Record references are to the Appendix in the United States Court of Appeals for the Fourth Circuit.

[3] Respondents rely heavily on the district court opinion in *L.C.L. Theaters, Inc.* v. *Columbia Pictures Industries, Inc.*, 421 F. Supp. 1090 (N.D. Tex. 1976), *aff'd in part, rev'd in part*, 566 F.2d 494 (5th Cir. 1978), a case involving similar facts. However, the district court in that case did not consider the issue of the admissibility of the checking reports under Rule 803(6), and did not discuss *Palmer* v. *Hoffman*, 318 U.S. 109 (1943).

II. The Rule of *Palmer* v. *Hoffman* Applies to the Checking Reports

Respondents also claim that documents for litigation are saved from exclusion under *Palmer* v. *Hoffman*, 318 U.S. 109 (1943), simply because they are prepared routinely, or because the preparation of such documents is the function or business of the persons who made them. There are no such exceptions to the *Palmer* rule.

Like the district court below, respondents attempt to confine *Palmer* to reports of "unique" or "extraordinary" occurrences that are not documented as part of the defendant's business routine. That is a plain misreading of *Palmer*. The engineer's accident report that was excluded in *Palmer* was objectionable not because of the infrequency of railroad grade-crossing accidents; on the contrary, the Court reasoned that the hearsay exception created by the business records rule could not be expanded to admit self-serving documents simply on the basis that they were prepared systematically, or as a regular part of the defendant's business.

The Court stated that "the fact that a company makes a business out of recording its employees' versions of their accidents does not put those statements in the class of records made 'in the regular course' of . . . business . . ." 318 U.S. at 113. The Court observed that, if the rule were otherwise, "any law office in the land could follow the same course" by making a " 'business' " out of "[p]reparation of cases for trial . . ." *Id.* Such an interpretation of the business records rule, the Court concluded, would open "wide the door to avoidance of cross-examination." *Id.* at 114.

The verification companies employed by respondents to conduct theater checks are in the same position as the law firms discussed in *Palmer*. Both are in the business of preparing documents for use in litigation. The regularity of the documents' preparation is not doubted. Nonetheless, the purpose for which the documents are made de-

prives them of the "earmarks of reliability" which *Palmer* demands. 318 U.S. at 114. Like documents prepared by lawyers for trial, the checking reports cannot qualify as business records because "they are calculated for use essentially in the court, not in the business." *Id.*

The court of appeals decision relied on by respondents, *United States* v. *Baxter*, 492 F. 2d 150 (9th Cir. 1973), *cert. denied*, 416 U.S. 940 (1974), is not to the contrary. The Ninth Circuit in that case expressly recognized that "business records prepared specifically to assist in imminent litigation are unreliable, because they are likely to be self-serving in a way that cannot be scrutinized by cross-examination at trial." 492 F. 2d at 165. The court approved the admission of the documents—record entries of illegal drug sales—precisely because the preparation of the records served a purpose *other than* the development of evidence for trial. *Id.* The incriminating records were used and relied on by the defendants in the conduct of a business which, although illicit, did not have as its purpose the preparation of evidence for use in litigation. The documents were thus properly admitted because their business purpose provided an independent check on the accuracy and reliability of the documents' contents.

In the instant case there is no independent business purpose served by theater checking, and the verification companies therefore have no independent reason to assure the accuracy of their checkers' reports. Because the only purpose of theater checking is the building of a record for possible litigation against exhibitors, the reliability or weight of the checking reports is not a question for the trier of fact, as contended by respondents.[4]

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[4] Respondents rely on a number of court of appeals decisions for the proposition that objections to the reliability or accuracy of business records go to the weight to be given such records, not to their admissibility. *United States* v. *Reese*, 568 F.2d 1246 (6th Cir. 1977); *United States* v. *Pfeiffer*, 539 F.2d 668 (8th Cir. 1976); *United States* v. *Evans*, 572 F.2d 455 (5th Cir. 1978), *cert. denied*,

The *Palmer* decision leaves no room for admission of litigation documents subject to a cautionary instruction to the jury. Such documents are inadmissible because of the purpose of their preparation, and they therefore cannot qualify as business records under Rule 803(6).

CONCLUSION

For the foregoing reasons, the instant petition should be granted.

Respectfully submitted,

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439 U.S. 870 (1978); *Crompton-Richmond Co.* v. *Briggs*, 560 F.2d 1195 (5th Cir. 1977); *Johnson* v. *United States*, 325 F.2d 709 (1st Cir. 1963). However, these cases do not involve records challenged on the grounds that they were prepared for use in litigation. This Court settled in *Palmer* that records of that type simply cannot qualify as business records within the traditional exception to the hearsay rule.